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SUPER LAW GROUP, LLC

June 23, 2016

Via Certified Mail, Return Receipt Requested

DKN Ready Mix, LLC
25-50 Borden Ave.
Long Island City, NY 11101

DKN Concrete Services, LLC
25-50 Borden Ave.
Long Island City, NY 11101

Diane's Ready Mix LLC
25-50 Borden Ave.
Long Island City, NY 11101

DKN Equipment & Supplies LLC
175A Commerce Drive
Hauppauge, NY 11788

Diane's Concrete Pumping Company, LLC
175A Commerce Drive
Hauppauge, NY 11788

Diane Macchio
25-50 Borden Ave.
Long Island City, NY 11101

Thomas Philippou
25-50 Borden Ave.
Long Island City, NY 11101

Re: Notice of Violation and Intent to File Suit under the Clean Water Act

Dear All:

We are writing on behalf of Riverkeeper, Inc.¹ ("Riverkeeper") to notify you of Riverkeeper's intent to file suit against DKN Ready Mix, LLC; DKN Concrete Services, LLC; DKN

¹ Riverkeeper, Inc. is a not-for-profit environmental organization existing under the laws of the state of New York, headquartered in Ossining, New York. Riverkeeper's mission includes safeguarding the environmental, recreational and commercial integrity of the Hudson River and its ecosystem, as well as the watersheds that provide New York City with its drinking water. Riverkeeper achieves its mission through public education, advocacy for sound public policies and participation in legal and administrative forums. Riverkeeper has more than 4,000 members, many of whom reside near to, use and enjoy the Hudson River and the waters and tributaries of New York Harbor, including

Equipment & Supplies, LLC; Diane's Ready Mix, LLC; Diane's Concrete Pumping Company, LLC; Thomas Philippou; and Diane Macchio (together, "DKN Ready Mix") pursuant to Section 505(a) of the federal Clean Water Act ("CWA")² for violations of the CWA.

Riverkeeper intends to file suit, as an organization and on behalf of its adversely affected members, in the United States District Court for the Eastern District of New York seeking appropriate equitable relief, civil penalties, and other relief no earlier than 60 days from the postmark date of this letter.³

During the sixty-day notice period, Riverkeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If DKN Ready Mix wishes to pursue such discussions, please contact the undersigned attorney immediately.

Riverkeeper intends to take legal action because DKN Ready Mix is discharging polluted stormwater from DKN Ready Mix's ready mix concrete facility located along Newtown Creek in Queens ("the Facility") to the waters of the United States without a permit. This is a violation of Sections 301(a) and 402(p)(2)(B) of the Clean Water Act.⁴ Further, DKN Ready Mix has not applied for coverage under, nor complied with the conditions of, an individual National Pollutant Discharge Elimination System ("NPDES") permit or the General Permit for the Discharge of Stormwater Associated with Industrial Activity ("General Permit")⁵ issued by the New York State Department of Environmental Conservation ("DEC"), in violation of Sections 402(p), and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).

The street address of the Facility is provided in government records as 25-50 Borden Avenue, Long Island City, NY. For clarity, the Facility location can be uniquely identified by tax block and lot numbers as Block 68 Lot 90, in Queens County. The waters of the United States that are polluted by the Facility are Newtown Creek and the East River.

I.

BACKGROUND

With every rainfall event, hundreds of millions of gallons of polluted rainwater pour into New York Harbor, Long Island Sound, and other receiving waters. The consensus among agencies

Newtown Creek, Coney Island Creek, Jamaica Bay, and the Gowanus Canal; waters that are polluted by industrial stormwater runoff.

² 33 U.S.C. § 1365(a). We refer to statutory provisions by their section in the Clean Water Act and provide the parallel citation to the United States Code only on first reference.

³ See 40 C.F.R. § 135.2(a)(3)(c) (notice of intent to file suit is deemed to have been served on the postmark date).

⁴ 33 U.S.C. §§ 1311(a) and 1342(p)(2)(B).

⁵ New York State Department of Environmental Conservation, *SPDES Multi-Sector General Permit For Stormwater Discharges Associated With Industrial Activity*, Permit No. GP-0-12-001, (hereinafter "General Permit"), available at <http://www.dec.ny.gov/chemical/9009.html>. This General Permit replaces earlier general permits for the discharge of stormwater associated with industrial activity. It became effective on October 1, 2012, and will expire on September 30, 2017.

and water quality specialists is that stormwater pollution accounts for more than half of the total pollution entering the marine environment each year.⁶

DEC has designated more than 7,000 river miles, 319,000 acres of larger waterbodies, 940 square miles of bays and estuaries, and 592 miles of Great Lakes shoreline in the State as “impaired,” or not meeting water quality standards, and unable to support beneficial uses such as fish habitat and water contact recreation.⁷ For the overwhelming majority of water bodies listed as impaired, stormwater runoff is cited as a primary source of the pollutants causing the impairment. Contaminated stormwater discharges can and must be controlled in order to improve the quality and health of these waterbodies.

Stormwater discharges flow from the Facility through a separate sewer system into Newtown Creek and ultimately into the East River and New York Harbor. DEC has classified Newtown Creek as an SD water.⁸ Under New York’s Water Quality Standards, a waterbody that is designated as SD is meant to be suitable for fishing and for fish, shellfish and wildlife survival.⁹ The New York Water Quality Standards also set numeric and narrative criteria for different water pollution parameters including dissolved oxygen, oil and grease, suspended and settleable solids, bacteria (pathogens), pH, temperature, nutrients, and others. A waterbody must meet these numeric and narrative criteria in order to support its designated uses.¹⁰

Newtown Creek, which is also a federally-listed Superfund site, consistently fails to meet state water quality standards; illegal stormwater discharges from this Facility contribute to this failure.¹¹ In the past, DEC has designated Newtown Creek as impaired pursuant to Section 303(d) of the CWA¹² for failure to meet minimum water quality standards due to high oxygen demand (low levels of dissolved oxygen) and the presence of floatables (oil, grease, and other debris) attributable in part to urban stormwater runoff.¹³ While the Creek has been removed from the list of waterbodies for which a Total Maximum Daily Load (“TMDL”) must be developed, the degraded water quality conditions that led to the impaired listing have not been addressed;¹⁴ polluted discharges to Newtown Creek continue to reduce the dissolved oxygen

⁶ Stormwater is water from precipitation events that flows across the ground and pavement after it rains or after snow and ice melt. See 40 C.F.R. § 122.26(b)(13).

⁷ See EPA, Watershed Assessment, Tracking and Environmental Results, New York Assessment Data for 2012, http://ofmpub.epa.gov/waters10/attains_state.report_control?p_state=NY&p_cycle=2012&p_report_type=A (last visited Aug. 4, 2015).

⁸ See 6 N.Y.C.R.R. § 890.6.

⁹ See 6 N.Y.C.R.R. § 701.14.

¹⁰ See 6 N.Y.C.R.R. §§ 702, 703.

¹¹ See NY DEC, *Impaired/DeListed Waters NOT Included on the 2014 Section 303(d) List Sept. 2014*, available at http://www.dec.ny.gov/docs/water_pdf/303dlistfinal2014.pdf (hereinafter “303(d) List”).

¹² 33 U.S.C. § 1313(d).

¹³ See 303(d) List.

¹⁴ Newtown Creek is not included on the section 303(d) list, but is included on a list of other impaired waters for which no Total Maximum Daily Load (“TMDL”) will be prepared. A TMDL is not necessary because other required control measures are expected to result in restoration in a reasonable period of time. Specifically, Newtown Creek pollution is being addressed through the CSO Consent Order to meet pathogen standards. See NYS Dep’t of

level in the Creek.¹⁵ Illegal stormwater discharges from this Facility carry oxygen demanding chemicals into Newtown Creek and therefore contribute directly to this problem.

For years, Newtown Creek was treated as an industrial dumping ground; businesses along its banks polluted with abandon. In recent decades, New York City has worked to reclaim the quality of New York Harbor and of Newtown Creek. The City and local residents have invested heavily in efforts to rejuvenate the Creek and surrounding neighbourhoods. Recently, the U.S. EPA joined the effort by designating Newtown Creek as a Superfund site, setting aside funds for a cleanup, and mobilizing public and private efforts to restore the Creek to a healthier state.¹⁶ Riverkeeper has been working for 50 years on abating pollution in the Hudson River and its tributaries, and has been working on the Creek with the City, the EPA, and many stakeholders for almost fifteen years. It is time for DKN Ready Mix to join fully in this broader effort to restore the biological integrity of Newtown Creek. At a minimum, DKN Ready Mix must stop illegally discharging polluted stormwater and other effluents.

II.

STANDARDS AND LIMITATIONS ALLEGED TO HAVE BEEN VIOLATED AND ACTIVITIES ALLEGED TO BE VIOLATIONS

A. DKN Ready Mix is Discharging Stormwater Associated with Industrial Activity to Waters of the United States without a Permit.

The CWA prohibits the discharge of pollutants to the waters of the United States except in accordance with a valid NPDES permit.¹⁷ DKN Ready Mix's industrial activity at the Facility has caused and continues to cause a "discharge of pollutants" within the meaning of Section 502(12) of the CWA¹⁸ and a "stormwater discharge associated with industrial activity" within the meaning of 40 C.F.R. § 122.26(b)(14) from the Facility on a regular basis. The Facility has exposed and continues to expose industrial pollutants to stormwater, at a minimum, (a) by receiving, storing, processing, and transporting concrete, sand, aggregate, Portland cement and other materials outside or otherwise exposing them to the elements, and (b) from vehicles entering and leaving the Facility that track pollutants off site. During precipitation events (including runoff from rainfall and snow or ice melt events), pollutants are carried away from the Facility in stormwater discharges into Newtown Creek.

DKN Ready Mix's activities at the Facility include but are not limited to purchasing, processing, and storing sand, gravel, and construction debris. In carrying out these activities at the Facility, DKN Ready Mix engages in storing, processing, and handling materials in a manner that exposes

Envtl. Conservation, Impaired/Delisted Waters NOT Included on the 2014 Section 303(d) List, http://www.dec.ny.gov/docs/water_pdf/303dnotlisted2014.pdf

¹⁵ See *Id.*

¹⁶ See 40 C.F.R. Part 300, App. B.

¹⁷ See CWA §§ 301(a) and 402.

¹⁸ 33 U.S.C. § 1362(12).

pollutants to precipitation and snowmelt. In particular, raw materials piles, machinery, and trucks can release pollutants onto the Facility including aggregate, sand, cement additives, waste materials and other minerals. The stormwater discharged into Newtown Creek can bring solids that suspend or dissolve in stormwater, heavy metals, pH affecting substances, and other pollutants into the Creek.¹⁹

Riverkeeper has observed and documented evidence of the release of polluted stormwater at the Facility. Sand, gravel, and construction debris is piled up against an incomplete concrete block wall with gaps —often protruding over the top of the wall. Riverkeeper has observed sand and aggregate on the top of the concrete block wall and spilling over or beyond the wall. When it rains, this material is carried down towards the shoreline and gradually into Newtown Creek. Further, the concrete blocks are not watertight; when it rains, polluted stormwater seeps into DKN Ready Mix's material piles and is channelled through fissures and gaps between the concrete blocks and then into the water below.

The stormwater that runs off the Facility contains debris, suspended solids, and other pollutants. Machinery on the site may release fuel, oil, lubricants, pH-affecting substances and chemical residue. These toxic pollutants are often generated in the form of small particulate matter, which settles on the ground and other surfaces that are exposed to stormwater and non-stormwater flows. Also, vehicles at the Facility may expose many other pollutants to the elements, including gasoline, diesel fuel, anti-freeze, and hydraulic fluids.

Because DKN Ready Mix fails to adequately shelter and otherwise contain these materials to prevent their release to the environment, precipitation falls on and flows over exposed materials, fluids, and particulates. Polluted stormwater discharges flow from the Facility directly into Newtown Creek.

Newtown Creek is a "water of the United States," as defined in 40 C.F.R. § 122.2 and, therefore, "navigable water" as defined in Section 502(7) of the CWA. DKN Ready Mix does not have a NPDES permit for these discharges of pollutants. Thus, DKN Ready Mix is discharging polluted industrial stormwater into navigable waters of the United States without the permit required under Sections 301 and 402 of the CWA.

B. DKN Ready Mix is Violating the Clean Water Act by Failing to Apply for NPDES Permit Coverage.

DKN Ready Mix is engaged in the business of providing ready mix concrete and, therefore, are an industrial discharger with a primary Standard Industrial Classification ("SIC") Code of 3273, which is an industrial activity in Sector E of the permit. Pursuant to Section 402(p) of the CWA and regulations promulgated by EPA pursuant to the CWA, DKN Ready Mix must apply for coverage under the General Permit or an individual NPDES permit for the discharge of polluted

¹⁹ See EPA, "Industrial Stormwater Fact Sheet Series, Sector E: Glass, Clay, Cement, Concrete, and Gypsum Product Manufacturing Facilities," available at <http://cfpub.epa.gov/npdes/stormwater/swsectors.cfm> (last visited Jan. 29, 2014).

stormwater. By failing to apply for coverage under the General Permit or an individual permit, DKN Ready Mix are violating CWA Sections 301(a) and 402(a) and (p) and 40 C.F.R. §§ 122.26(c)(1) and (e)(1).²⁰

To be eligible to discharge under the General Permit, DKN Ready Mix must submit to DEC a registration form called a "Notice of Intent."²¹ Notice of Intent forms are available online from DEC.²² To register, DKN Ready Mix is required, among other things, to list all stormwater discharges, including descriptions of the industrial activities taking place in the drainage area of each discharge and the acreage of industrial activity exposed to stormwater, the separate storm sewer system or immediate surface water body or wetland to which site runoff discharges, and the name of the watershed and nearest waterbody to which the site ultimately discharges and information about whether the receiving waters are impaired.²³ DKN Ready Mix has failed to prepare and file a Notice of Intent or an application for an individual permit.²⁴

C. DKN Ready Mix is Violating the Clean Water Act by Failing to Comply with the General Permit.

As a discharger of stormwater associated with industrial activity, DKN Ready Mix must comply at all times with the requirements of the General Permit (or an individual permit).²⁵ By discharging stormwater associated with industrial activity without complying with the General Permit, DKN Ready Mix is violating CWA Sections 301(a) and 402(a) and (p).²⁶ The main General Permit requirements that DKN Ready Mix has failed and continues to fail to meet are explained further below.

²⁰ Sections 301(a) and 402(a) and (p) make it unlawful for you to discharge stormwater associated with industrial activity without obtaining a NPDES permit. 40 C.F.R. Sections 122.26(c)(1) and (e)(1) require you to apply for a NPDES permit that covers your discharge of stormwater associated with industrial activity.

²¹ See General Permit, Part I.E.3. In notifying you that the Clean Water Act requires coverage under and compliance with a valid NPDES permit in order to lawfully discharge, and that submission of a Notice of Intent to DEC is required in order to obtain coverage under the General Permit, Riverkeeper does not concede that all of the activities conducted at the Facility are necessarily eligible for coverage under that permit. For example, if the Facility is discharging process wastewater, such as wash water, or has any other polluted non-stormwater discharge that is not authorized by the General Permit, then an individual NPDES permit is required and the failure to obtain and comply with an individual NPDES permit for such discharges also violates CWA §§ 301(a) and 402(p). The conditions for eligibility to discharge under the General Permit are provided in Part I.C of the permit.

²² See http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²³ See Division of Water, NY DEC, *Notice of Intent For Stormwater Discharges Associated with Industrial Activity under the State Pollutant Discharge Elimination System (SPDES) Multi-Sector General Permit GP-0-12-001 (MSGP)* (2012), available at: http://www.dec.ny.gov/docs/water_pdf/gpnoi.pdf.

²⁴ A thorough search of EPA's Enforcement & Compliance History Online ("ECHO") database and DEC's records reveals that no Notice of Intent has been submitted for the Facility.

²⁵ This section discusses the compliance requirements of the General Permit. If DKN Ready Mix elects to seek coverage under an individual NPDES permit instead, the conditions of that individual permit will be at least as strict as those of the General Permit, thus DKN Ready Mix will still be required to comply with all of the following.

²⁶ Sections 301(a) and 402(a) and (p) make it unlawful for DKN Ready Mix to discharge stormwater associated with industrial activity without first complying with all of the conditions established in a NPDES permit.

1. DKN Ready Mix has not developed and implemented an adequate Stormwater Pollution Prevention Plan.

Before submitting a registration form, DKN Ready Mix must prepare, make available, and implement a Stormwater Pollution Prevention Plan (“SWPPP”) in accordance with schedules established in the General Permit.²⁷ On June 8, 2010, DKN Ready Mix developed a SWPPP, but the SWPPP is legally insufficient because it does not satisfy the requirements of the General Permit.²⁸

A SWPPP must identify potential sources of pollution that may affect the quality of stormwater discharges associated with industrial activity. Further, the SWPPP must describe and ensure the implementation of practices that minimize the discharge of pollutants in these discharges and that assure compliance with the other terms and conditions of the General Permit, including achievement of effluent limitations.²⁹

The SWPPP is inadequate because it does not ensure that DKN Ready Mix will implement practices that minimize the discharge of pollutants.³⁰ The SWPPP purports to ensure that the Facility is a “no discharge” property, but this claim relies on the false premise that the SWPPP delineates a plan to contain the 24 hour - 100 year storm event. According to the SWPPP, in order to contain a 100 year storm event, the Facility needs 13,085 cubic ft. of stormwater containment capacity.³¹ The SWPPP purports to achieve this capacity by way of containment settling tanks with a volume of 3,840 cubic ft., and a concrete berm along the perimeter of the Facility that will contain an additional 9,408 cubic ft. of stormwater.³²

The SWPPP is inadequate because this is not a plausible approach to containing the 24 hour - 100 year storm event. First, Riverkeeper has observed the concrete wall on the back side of the Facility to be anything but water tight, with large gaps that are clearly visible. Second, the Facility’s wide driveway defeats any attempt to contain a large storm event on site. Third, even assuming the Facility could reliably contain 13,085 cubic ft. of stormwater, the SWPPP does not describe what will happen to this stormwater: whether it will be transported off site, whether operations will be put on hold as the Facility waits out the evaporation of an enormous quantity of pooling water, or, as observed by Riverkeeper, the stormwater will discharge into Newtown Creek.

Accordingly, DKN Ready Mix has not developed and implemented a legally compliant SWPPP, as required by Part III of the General Permit, and is therefore in violation.

²⁷ See General Permit Part III.B.

²⁸ Stormwater Pollution Prevention Plan for: Diane’s Ready Mix LLC dba DKN Concrete Plant LLC (June 8, 2010) (*hereinafter*, “SWPPP”).

²⁹ See General Permit Part III.A.

³⁰ SWPPP at 7.

³¹ *Id.* at 3.

³² *Id.* at 7.

2. DKN Ready Mix has not implemented control measures and Best Management Practices that are selected to meet best available technology standards.

DKN Ready Mix cannot legally discharge stormwater under the General Permit until DKN Ready Mix implements mandatory general and sector-specific control measures called Best Management Practices (“BMPs”) in order to minimize the discharge of pollutants from the Facility.³³ The selected measures must reduce the discharge of pollution from the Facility to the extent practicable through use of the best available technology for the industry.

The General Permit requires that “[t]he owner or operator must select, design, install, and implement control measures (including best management practices),” in accordance with good engineering practices, to meet the effluent limits contained in the permit.³⁴ The General Permit’s effluent limits include both numeric limits specific to certain sectors³⁵ and non-numeric technology-based effluent limits that apply to all facilities.³⁶ These non-numeric technology-based restrictions include minimizing the exposure of pollutants to stormwater³⁷ and minimizing the discharge of pollutants in stormwater³⁸ “to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”³⁹

DKN Ready Mix has not minimized the discharge of pollution to the extent achievable by implementing control measures or BMPs that are technologically achievable and economically practicable and achievable in light of best industry practice, as required by Parts I.B.1 and VIII of the General Permit. For example, the SWPPP requires the “[t]arpping of bulk sand and gravel” so as to minimize these materials from being carried off site in the Facility’s stormwater discharges.⁴⁰ Riverkeeper has observed large piles of sand, without tarping and exposed to the elements, near to both the driveway entrance and on the backside of the Facility. Furthermore, as previously discussed, DKN Ready Mix’s plan to contain stormwater by encircling the site with a concrete wall is an ineffective method of ensuring that there are no stormwater discharges from the Facility.

³³ See General Permit Part I.B.1, *see also* Part VII (setting forth sector-specific control measures and practices).

³⁴ General Permit Part I.B.1.a. *See also* Part III.C.7 (“The SWPPP must document the location and type of BMPs installed and implemented at the facility to achieve the non-numeric effluent limits in Part I.B.1.a(2) and where applicable in Part VIII, and the sector specific numeric effluent limitations in Part VIII.”).

³⁵ See General Permit, Part VIII.

³⁶ See General Permit, Part I.B.1.a.2.

³⁷ See General Permit, Part I.B.1.a.2.a.

³⁸ See General Permit, Part I.B.1.a.2.f.

³⁹ See General Permit, Part I.B.1 (“In the technology-based limits included below and in Part VIII, the term ‘minimize’ means reduce and/or eliminate to the extent achievable using control measures (including best management practices) that are technologically available and economically practicable and achievable in light of best industry practice.”).

⁴⁰ SWPPP at 7.

3. DKN Ready Mix has not conducted routine site inspections or complied with monitoring, recordkeeping, and reporting requirements.

DKN Ready Mix must conduct an annual comprehensive site inspection and evaluation of areas where industrial materials or activities are exposed to precipitation or where spills and leaks have occurred within the past three years.⁴¹ The inspection must ensure that all stormwater discharges are adequately controlled and that all BMPs are functioning as expected.⁴² Records of this inspection must be kept for five years.⁴³

In addition, qualified facility personnel must carry out routine inspections at least quarterly.⁴⁴ During these inspections, personnel must evaluate conditions and maintenance needs of stormwater management devices, detect leaks and ensure the good condition of containers, evaluate the performance of the existing stormwater BMPs described in the SWPPP, and document any deficiencies in the implementation and/or adequacy of the SWPPP.⁴⁵ Such deficiencies must then be addressed through corrective actions.

The General Permit requires that all covered facilities conduct multiple types of analytical monitoring, and DEC may require additional individualized monitoring as well.⁴⁶ In particular, all facilities authorized under the General Permit must:

- collect and analyze stormwater samples for each outfall at least annually;⁴⁷
- conduct visual monitoring of stormwater discharges at least quarterly;⁴⁸
- perform an annual dry weather inspection to detect non-stormwater discharges;⁴⁹
- inspect, sample and monitor discharges from coal pile runoff;⁵⁰
- inspect, sample and monitor discharges from secondary containment structures and transfer areas;⁵¹
- document storm events during which any samples are taken;⁵²
- document all of these monitoring activities;⁵³
- keep records of the monitoring with the Facility's SWPPP;⁵⁴ and

⁴¹ See General Permit, Part IV.A.1.

⁴² See General Permit, Part IV.A.1.

⁴³ See General Permit, Part IV.A.2.

⁴⁴ See General Permit, Part III.C.7.b.2.

⁴⁵ See General Permit, Part III.C.7.b.1 and b.3.

⁴⁶ See General Permit, Part IV.B.3.

⁴⁷ See General Permit, Part IV.B.1.c (requiring at least annual collection and analysis of stormwater samples). See General Permit, Part IV.B.1.d, .e, .f, and .g for obligations to sample more frequently.

⁴⁸ See General Permit, Part IV.B.1.a.

⁴⁹ See General Permit, Part IV.B.1.b.

⁵⁰ See General Permit, Part IV.B.1.d.

⁵¹ See General Permit, Part IV.B.1.f.

⁵² See General Permit, Part IV.B.2.c.

⁵³ See, e.g., General Permit, Parts IV.B.1.a.8, IV.B.1.b.4, IV.B.1.c.9, see generally Part IV.E.

⁵⁴ See General Permit, Part IV.E.

- submit an annual report to DEC accompanied by a Discharge Monitoring Report detailing the results of all required stormwater samples, as well as reports that documents any instance of non-compliance with benchmarks or numeric effluent limitations.⁵⁵

Because DKN Ready Mix engages in industrial activities associated with a Material Recycling Facility under Sector E, sampling is required for:

- Total Suspended Solids (TSS)
- pH
- Total Recoverable Iron⁵⁶

DKN Ready Mix has violated the General Permit by not collecting and analyzing stormwater samples. This failure is a product of the SWPPP being predicated on the incorrect assumption that there are no discharges at the Facility. Likewise, DKN Ready Mix does not submit Discharge Monitoring Reports to DEC.

Riverkeeper is not necessarily aware of all industrial activities taking place at the Facility. To the extent that industrial activities other than the above are carried out at the Facility, other sampling may be required as well.⁵⁷ This notice provides DKN Ready Mix with sufficient information to identify the standards and limitations that apply to all categories of industrial activity.

DKN Ready Mix has failed to conduct the required annual and other routine inspections, monitoring, and testing, as required by, at least, Parts III, IV, and VIII of the General Permit. DKN Ready Mix also has failed to retain records and submit monitoring reports to DEC, as required by, at least, Parts IV and VIII of the General Permit.

4. DKN Ready Mix has failed to comply with additional requirements located in Part VIII of the General Permit.

As noted above, the General Permit contains various requirements specific to ready mix concrete plants. These requirements, some of which are referenced above, are collected in Part VIII of the General Permit. They include:⁵⁸

- A requirement to include in your SWPPP and annual reports to DEC a description of measures that ensure that process wastewater that results from washing of trucks, mixers, transport buckets, forms or other equipment are discharged in accordance with a separate SPDES permit or are recycled. DKN has never submitted an annual report to DEC and thus has failed to provide such descriptions.

⁵⁵ See General Permit, Part IV.B.1 and 2 and Part IV.C.

⁵⁶ See General Permit, Part VIII, Sector E.

⁵⁷ See *Id.*

⁵⁸ See General Permit, Part VIII, Sector E.

- A requirement to sweep the Facility weekly to prevent or minimize the discharge of cement and aggregate. Although DKN Ready Mix's SWPPP states at one point that sweeping is performed weekly and at another point states that sweeping is performed daily, Riverkeeper has not seen any evidence that cleanup occurs on either basis.
- A requirement to, if practicable, store cement and any other fine granular solids in enclosed silos or hoppers, buildings, or under other covering. Riverkeeper has observed large piles of sand at the Facility, uncovered and exposed to precipitation.

DKN Ready Mix's activities are included in the definition of industrial activity to which the CWA applies. Therefore, DKN Ready Mix must obtain coverage under and comply with the requirements of the General Permit, including those specific to DKN Ready Mix's industrial activities, as described in Part VIII and outlined above. DKN Ready Mix has failed to obtain coverage under the General Permit and comply with these additional requirements.

5. DKN Ready Mix is Clearly Violating the Clean Water Act.

In sum, DKN Ready Mix's discharge of stormwater associated with industrial activities without a permit, DKN Ready Mix's failure to apply for permit coverage, and DKN Ready Mix's failure to comply with the above-listed conditions of the General Permit (or an individual NPDES permit) constitute violations of the General Permit and of Sections 301(a) and 402(p) of the Clean Water Act.

III.

PERSONS RESPONSIBLE FOR ALLEGED VIOLATIONS

DKN Ready Mix, LLC, DKN Concrete Services, LLC, DKN Equipment & Supplies, LLC, Diane's Ready Mix, LLC, Diane's Concrete Pumping Company, LLC, Thomas Philippou and Diane Macchio (together, "DKN Ready Mix") are the parties responsible for the violations alleged in this Notice (as defined by Section 502(5) of the CWA). Riverkeeper believes that DKN Ready Mix has operated the Facility since at least 2009. DKN Ready Mix has operational control over the day-to-day industrial activities at this Facility. Therefore, DKN Ready Mix is responsible for managing stormwater at the Facility in compliance with the CWA. Riverkeeper hereby puts DKN Ready Mix on notice that if Riverkeeper subsequently identifies additional persons as also being responsible for the violations set forth above, Riverkeeper intends to include those persons in this action.

IV.

LOCATION OF THE ALLEGED VIOLATION

The violations alleged in this Notice have occurred and continue to occur at the Facility located at 25-50 Borden Avenue, in Long Island City, New York 11101. For clarity, the Facility location can be uniquely identified as Block 69, Lot 90, in Queens County. The waterfront edge of the Facility runs along and discharges directly into Newtown Creek overland. The failure to develop and implement pollution prevention plans and take the other required measures are violations occurring at the Facility in general and in the inadequate documents themselves.⁵⁹

V.

DATES OF VIOLATION

Every day upon which DKN Ready Mix has failed to apply for permit coverage since DKN Ready Mix first commenced operations at the Facility and discharged polluted stormwater is a separate violation of Sections 301(a) of the CWA and EPA's regulations implementing the CWA.⁶⁰ These days of violation have continued consecutively since DKN Ready Mix commenced operation at the Facility.

Additionally, DKN Ready Mix has discharged without a permit in violation of Section 301(a) of the CWA on every day since DKN Ready Mix commenced operations at the Facility on which there has been a measurable precipitation event or discharge of previously accumulated precipitation (i.e., snowmelt) over 0.1 inches.

Finally, if DKN Ready Mix seeks permit coverage after receiving this letter but fails to fully comply with the requirements of the General Permit (or an individual permit), each day upon which DKN Ready Mix claims coverage under a NPDES permit but fails to comply with that permit will constitute a separate day of violation with respect to each unmet condition of that permit.

DKN Ready Mix is liable for the above-described violations occurring prior to the date of this letter and for every day after the date of this letter that these violations continue. In addition to the violations set forth above, this Notice covers all violations of the CWA evidenced by

⁵⁹ The federal courts have held that a reasonably specific indication of the area where violations occurred, such as the name of the facility, is sufficient and that more precise locations need not be included in the notice. *See, e.g., Natural Resources Defense Council v. Southwest Marine, Inc.*, 945 F. Supp. 1330, 1333 (S.D. Cal. 1996), *aff'd* 236 F.3d 985, 996 (9th Cir. 2000); *City of New York v. Anglebrook Ltd. Partnership*, 891 F. Supp. 900, 908 (S.D.N.Y. 1995); *Assateague Coastkeeper v. Alan & Kristin Hudson Farm*, 727 F. Supp. 2d 433, 439 (D. Md. 2010); *United Anglers v. Kaiser Sand & Gravel Co.*, No. C 95-2066 CW, 1995 U.S. Dist. LEXIS 22449 at *4 (N.D. Cal. Sept. 27, 1995).

⁶⁰ *See* 33 U.S.C. §§ 402(p)(3)(A) and (p)(4)(A) (requiring the establishment of industrial stormwater NPDES permits and of a permit application process).

information that becomes available after the date of this Notice of Intent to File Suit.⁶¹ These violations are ongoing, and barring full compliance with the permitting requirements of the Clean Water Act, these violations will continue.

VI.

RELIEF REQUESTED

Riverkeeper will ask the court to order DKN Ready Mix to comply with the Clean Water Act, to pay penalties, and to pay Riverkeeper's costs and legal fees.

First, Riverkeeper will seek declaratory relief and injunctive relief to prevent further violations of the Clean Water Act pursuant to Sections 505(a) and (d), and such other relief as permitted by law. Riverkeeper will seek an order from the Court requiring DKN Ready Mix to obtain NPDES permit coverage and to correct all other identified violations through direct implementation of control measures and demonstration of full regulatory compliance.

Second, pursuant to Section 309(d) of the CWA,⁶² each separate violation of the CWA subjects DKN Ready Mix to a penalty not to exceed \$37,500 per day for each violation that occurred. Riverkeeper will seek the full penalties allowed by law.

Third and lastly, pursuant to Section 505(d) of the CWA, Riverkeeper will seek recovery of litigation fees and costs (including reasonable attorney and expert witness fees) associated with this matter.

VII.

PERSONS GIVING NOTICE

The full name, address, and telephone number of the persons giving notice are as follows:

Riverkeeper, Inc.
20 Secor Road
Ossining, NY 10562
(914) 478-4501
Attn.: John Parker

⁶¹ See, e.g. *Public Interest Research Grp. v. Hercules, Inc.*, 50 F.3d 1239, 1248-49 (3d Cir.1995) (a notice that adequately identifies specific violations to a potential defendant also covers repeated and related violations that the plaintiff learns of later. "For example, if a permit holder has discharged pollutant 'x' in excess of the permitted effluent limit five times in a month but the citizen has learned only of four violations, the citizen will give notice of the four violations of which the citizen then has knowledge but should be able to include the fifth violation in the suit when it is discovered.").

⁶² 33 U.S.C. § 1319(d); see also 40 C.F.R. § 19.4 (Adjustment of Civil Monetary Penalties for Inflation).

VIII.

IDENTIFICATION OF COUNSEL

Riverkeeper is represented by legal counsel in this matter. The name, address, and telephone number of Riverkeeper's attorneys are:

Edan Rotenberg
Reed W. Super
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

IX.

CONCLUSION

The foregoing provides more than sufficient information to permit DKN Ready Mix to identify the specific standard, limitation, or order alleged to have been violated, the activity alleged to constitute a violation, the person or persons responsible for the alleged violation, the location of the alleged violation, the date or dates of such violation, and the full name, address, and telephone number of the person giving notice.⁶³

If DKN Ready Mix revises its SWPPP in response to this letter, Riverkeeper requests that DKN Ready Mix send a copy to the undersigned attorney.⁶⁴ Generally, Riverkeeper asks that DKN Ready Mix please inform the undersigned attorney of DKN Ready Mix's efforts so Riverkeeper can work with DKN Ready Mix to avoid disputes over the contents or implementation of the SWPPP.⁶⁵

⁶³ 40 C.F.R. § 135.3(a).

⁶⁴ Note that under Part III.D.2 of the General Permit, the owner or operator of a facility "must make a copy of the SWPPP available to the public within 14 days of receipt of a written request."

⁶⁵ Riverkeeper will not send a new notice letter in response to any effort DKN Ready Mix makes to come into compliance with the Clean Water Act after receiving this letter, for example, by developing a SWPPP. The federal courts have held that citizens sending a notice letter are not required to identify inadequacies in compliance documents that do not yet exist and are "not required to send a second notice letter in order to pursue specific claims regarding the inadequacies of [a defendant's] post-notice compliance efforts." *WaterKeepers N. Cal. v. AG Indus. Mfg.*, 375 F.3d 913, 920 (9th Cir. 2004). See also *Natural Resources Defense Council v. Southwest Marine, Inc.*, 236 F.3d 985, 997 (9th Cir. 2000) ("subject matter jurisdiction is established by providing a notice that is adequate on the date it is given to the defendant. The defendant's later changes . . . do not retroactively divest a district court of jurisdiction under 33 U.S.C. § 1365(b)."); *City of New York v. Anglebrook L.P.*, 891 F. Supp. 900, 908 (S.D.N.Y.

During the sixty-day notice period, Riverkeeper is willing to discuss effective remedies for the violations noted in this letter that may avoid the necessity of protracted litigation. If DKN Ready Mix wishes to pursue such discussions, please contact the undersigned attorney immediately so that negotiations may be completed before the end of the sixty-day notice period. We do not intend to delay the filing of a complaint in federal court, regardless of whether discussions are continuing at the conclusion of the sixty days.

Very truly yours,



Edan Rotenberg
Nicholas W. Tapert
Super Law Group, LLC
180 Maiden Lane, Suite 603
New York, New York 10038
(212) 242-2355

cc:

Gina McCarthy, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Judith A. Enck, EPA Region 2 Administrator
Environmental Protection Agency
290 Broadway
New York, NY 10007-1866

Basil Seggos, Commissioner
New York State Department of Environmental Conservation
625 Broadway
Albany, NY 12233-1011

1995) (plaintiff's notice letter based on inadequacies of defendant's original SWPPP held sufficient to establish court's jurisdiction, even though defendant later prepared a revised SWPPP).

